United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1239

To be argued by
T. GORMAN REILLY

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1239

UNITED STATES OF AMERICA,
Appellee,

—v.—

ROBERT WORTHINGTON,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

Robert Worthington appeals from a judgment of conviction entered on June 19, 1975 in the United States District Court for the Southern District of New York after a five-day trial before the Honorable Charles H. Tenney, United States District Judge, and a jury.

Indictment 74 Cr. 1056 charged Worthington, in eleven counts, with making false statements on loan applications to various New York banks, the proceeds of which were insured by the Federal Deposit Insurance Corporation, in violation of Title 18, United States Code, Sections 1014 and 2.

The trial commenced on May 16, 1975 and concluded on May 22, 1975, when the jury found the defendant guilty on Counts 1, 2, 4, 5, 7, 8, 9, 10 and 11. When ad-

vised by the foreman that the jury had not yet reached a verdict as to Counts 3 and 6, the Court, on its own motion, dismissed these two counts.

On June 19, 1975, Worthington was sentenced to concurrent terms of two years' imprisonment on Counts 1, 2, 4 and 5. On Counts 7, 8, 9, 10 and 11 the Court sentenced Worthington to concurrent terms of two years' imprisonment, to be served consecutively to the sentence imposed on Counts 1, 2, 4 and 5. Execution of sentence on the latter five counts was suspended, and the defendant was placed on probation for a period of three years to commence upon termination of the term of imprisonment imposed on Counts 1, 2, 4 and 5. Worthington is at liberty pending this appeal.

Statement of Facts

The Government's Case

In 1973, Robert Worthington set himself up as a financial consultant. He appropriated the corporate name "The American Planning Company of New York, Inc.", named himself its president, and proceeded to establish offices in mid-town Manhattan at 520 Fifth Avenue and in the financial district at 2 World Trade Center. Close scrutiny of these seemingly impressive credentials, however, revealed that the American Planning Company of New York, Inc. had been dissolved in 1965 by the Secretary of State of the State of New York for failure to pay taxes, that 520 Fifth Avenue was the site of an answering service where for a modest fee Worthington had arranged to receive his mail and telephone calls, and that, although Worthington had arranged a lease at the World Trade Center, he never moved in, never paid any rent and was eventually served with an eviction notice (G. Ex. 17, G. Ex. 21; Tr. 479-483, 493-498).

From October 1973 through September 1974 Worthington spent a considerable part of his time as the operating head of American Planning Company seeking out personal loans from various banks both for himself and for his clients by submitting false information on application forms. Eleven of these transactions formed the basis of the Federal indictment which was subsequently filed against him.

Worthington submitted three loan applications on his own behalf, two of which were granted. Using the name "R. Theodore Worthington" he claimed to be a financial consultant with American Planning Company (at its Fifth Avenue address) drawing a yearly salary of $36,000 and to have been with the company for seventeen years. (Count One; G. Ex. 1A). This loan application for $8,028, made to a branch of the Banker's Trust Company on October 1, 1973, was declined (G. Ex. 1). However, his application made the same day to a branch of The First National City Bank to finance the purchase of a new Lincoln Mark IV was successful. It was aided by his use of a different name—"R. Theodore Garris"—and a false claim that he received a $22,000 yearly salary from an apparel manufacturing company in addition to the $10,000 per annum which he supposedly derived from American Planning Company (Count Two; G. Ex. 2). Some six months later on April 29, 1974 Worthington submitted a loan application to a branch of the Banker's Trust Company using his true name. His claim of a generous salary from the American Planning Company (of Fifth Avenue and the World Trade Center) was buttressed by a copy of a false W-2 form which Worthington brought in to the bank to show that he had earned $58,098 in 1973. This loan of $5,940 was granted. (Count Four; G. Ex. 4, G. Ex. 4-A; Tr. 331-334).

Worthington soon acquired a deserved reputation for being able to obtain bank loans for very poor credit risks.

Elliot Samach, a self-employed manufacturer's representative with over $50,000 in past debts and mounting alimony obligations, clearly fell in this category (Tr. 159-162). When Samach was introduced to Worthington at the Cattleman Restaurant in mid-town Manhattan in early February 1974 he told Worthington of his dire financial straits and of his desire to obtain a loan. Worthington indicated that this could be done but that his fee would be 20% of whatever loan was obtained. Worthington asked for $300 as a retainer for which he gave Samach a signed receipt (Tr. 162-163; G. Ex. 13). A few days later the two men met in another mid-town restaurant. Worthington took down information about Samach's date of birth, social security number, residence and other such items. He then told Samach that this information would have to be "structured" in filling out the loan application (Tr. 163-164). A Banker's Trust Company loan application was filled out by Samach with the "structured" information being provided by Worthington. Worthington took the completed application, replete with false statements as to date of birth, social security number, present and past residence, present and past employment, and debts. It was received by the bank on February 11, 1974, but was declined shortly thereafter* (Count Three; G. Ex. 3, G. Ex. 3-A; Tr. 167-168). In early June 1974 Samach did obtain a $6,520 loan from the Banker's Trust Company with Worthington's assistance. This time Worthington presented the loan application in blank to Samach for his signature. Using totally different ** false information as to Samach's date of birth, social security number, residence

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* Count Three was dismissed by the Court on its own motion.

** The only information common with the earlier application was the patently false statement that Samach had no present debts.

and employment, Worthington completed the loan application himself. On May 17, 1974 he took the application to a branch of the Banker's Trust Company, introduced himself to the loan officer as Elliot Samach* and arranged for the false employment claim on the application to be corroborated. When it came time to pick up the proceeds of the loan, Samach was instructed to wait several blocks from the bank while Worthington went in to collect them using Samach's name and driver's license. When he emerged from the bank, the two men went to a hamburger shop where Worthington handed over the $6,500. Samach returned $1,300 to Worthington pursuant to their 20% agreement. Worthington also kept a pass book for an account which he had just opened with a $20 deposit in Samach's name. (Count Five; G. Ex. 5, 5-A, 5-C, 5-D; Tr. 168-177). On September 9, 1974 Worthington once again submitted a "structured" loan application in Samach's name, but this time without Samach's knowledge or permission.** Among the more interesting items of information on the application—other than the misspelling of "Elliot" with one "l"—was Mr. Samach's employment for eight years as an analyst with American Planning Inc. at a yearly salary of $38,000. His supervisor was listed as one "Garris Worth". This loan was never acted upon (Count Nine; G. Ex. 9; Tr. 177-182).

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* The loan officer, Miss Willie Williams, understood the applicant's name to be "Somach" and she marked the loan folder accordingly (G. Ex. 5). Worthington who invited her out to lunch on two occasions never corrected her misunderstanding as to the true spelling of Samach or as to his true identity (Tr. 340-341, 344-345, 347).

** The loan officer at the First National City Bank could not make an in-court identification of the defendant. She did recall that he was a well dressed black man who wore a distinctive safari helmet. She also recalled that he presented a driver's license and a pass book from another bank (Tr. 325-328).

Philip Nolan was introduced to Worthington by Elliot Samach in March or April 1974. Nolan was the struggling director of the New York Academy of Theatrical Arts, an acting school, and was also interested in securing backers for a play he wished to produce. The Academy's and his own finances were not at all good.* Nolan advised Worthington of his desperate financial condition and of his desire to obtain financing for the Academy. After several discussions Worthington agreed to arrange for a loan in return for his customary 20% fee. The two men later met at a mid-town restaurant where Worthington instructed Nolan on how to fill out the application form. Other than the applicant's name, there were virtually no truthful statements on this application. Worthington took the application and later submitted it to a branch of the Banker's Trust Company. The loan application was denied** (Count Six; G. Ex. 6, 6-A, 6-B; Tr. 255-267). Worthington then advised Nolan to submit an application using the name Philip Friedman. This is the name Nolan had been born with but had not used since 1955 when he assumed the stage name Philip Nolan. Worthington told Nolan that it would be easier for him to get a loan this way, since there would be no harmful credit information about Philip Friedman. Once again at Worthington's direction Nolan (Friedman) completed a materially false application. Following Worthington's instructions Nolan left the completed application at a designated branch of the Banker's Trust Company. Although fraudulent letters were received

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* On July 1, 1974 the Internal Revenue Service padlocked the Academy's doors for non-payment of taxes (Tr. 256). In September 1974, Nolan himself filed for bankruptcy, listing debts of $57,000 and assets of $2,750. He was adjudicated a bankrupt in January 1975 (Tr. 286).

** Count Six was dismissed by the Court on its own motion after the jury returned its partial verdict.

by the bank confirming Friedman's non-existent employment and residence, the application was declined on July 24, 1974* (Count Seven; Tr. 268-277). Nolan participation in the final loan application submitted in his name was minimal. Worthington asked that Nolan sign the short-form application, and he volunteered to take care of the rest. That included filling out the form with false identifying, residence and employment data (e.g., that Nolan had been employed with an insurance company for the past ten years making a salary of $42,000). He also approached a friend of Nolan's, Shirley Johnson, and persuaded her to sign a co-maker's statement, which he thereupon altered, without her knowledge, to indicate that she was Nolan's wife. Worthington then appeared at a downtown branch of Banker's Trust company, represented himself to be Nolan and submitted the application. When the loan officer asked for identification, Worthington stated that his car was double parked, that he had to run and that he would bring whatever was needed when the loan was approved. The loan was not approved (Count Eleven; G. Ex. 11, G. Ex. 11-A; Tr. 282-286, 363-367).

While Samach and Nolan were generally aware of Worthington's fraudulent method of operation, the same can not be said of either Ahmet Edman or Joseph Semper. These two unsuspecting clients of Worthington had no reason to believe that he was not the professional and skillful financial consultant he claimed to be. Edman, a manager of the Brasserie Restaurant for six years, was encouraged by Worthington to open his own restaurant. He was to take care of the cooking and Worthington was

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* At about this time Worthington unsuccessfully urged Nolan to submit an application to a different branch of the Banker's Trust Company under the name of William P. Friedman. He left detailed instructions with Nolan's secretary as to how to fill out this application (Tr. 277-280). The sheet of paper containing these instructions was received in evidence (G. Ex. 14; Tr. 280).

to tend to the finances. The restaurant opened in the Spring of 1974 and was closed before the end of the summer. Edman put whatever money he had into the restaurant; he was unable to draw any money from the struggling operation; and, in June, at Worthington's behest, he signed a blank loan application to obtain financing for the restaurant. Worthington completed the application, stating that the loan of $6,500 would be used to buy furniture. This was the least of the many blatantly false statements in the application.* Edman was asked to accompany Worthington to the Banker's Trust Company where he was briefly introduced to the loan officer (and Worthington's luncheon partner) Willie Williams.** Edman was never shown the completed loan form. At the bank Worthington asked Edman to wait for him upstairs. The bank received fraudulent letters of verification (e.g., from the American Planning Company to the effect that Edman was employed at $36,000 per year), but it did not approve the loan (Count Eight, G. Ex. 8, 8-A through 8-J; Tr. 341-342, 438-455).

Joseph Semper, the president of a small electrical contracting company in Harlem, was referred to Worthington for the purpose of ameliorating Semper's tight credit position. Worthington told Semper over drinks at the Pan American Building Helicopter Club that he represented the Federal Government and other agencies for

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* A sampling of the false data follows: that Edman was single and lived in Fort Lee, N.J., c/o Worthington; that his nearest relative was Theodore Garris; that he was a restaurant consultant with American Planning Company, earning $36,000 per year; and that he derived $300 per week from the La Boheme Restaurant and from realty which he owned in Brooklyn. Edman testified that each of these statements was false (G. Ex. 8-A; Tr. 445-449).

** She was still under the misapprehension that Worthington was Elliot Somach (Tr. 341-342).

minorities. After getting specific financial data from Semper, Worthington produced a blank loan application which Semper then proceeded to partially fill out. Worthington took the loan application to yet another branch of the Banker's Trust Company on September 12, 1974. But by this time, the application was peppered with additional and false information (not in Semper's handwriting) to the effect that Semper's salary was $38,000,* that he had rental income of $4,000 and that he had paid off all but $1,000 of a $5,000 loan from Chemical Bank.** Worthington had Semper accompany him downtown so that he could use Semper's driver's license as identification. A week later Worthington returned to the bank with a fraudulent W-2 form and pay stub to support the application. He also signed Semper's name on a promissory note in the presence of a bank officer. The loan application was not acted upon (Count Ten, G. Ex. 10, 10-A through 10-E; Tr. 379-384, 414-430).

The indictment in this case was filed on November 8, 1974. Subsequently on December 18, 1974 Worthington was again arrested by the F.B.I. on separate charges. After his arrest, he was advised of his *Miranda* rights by the arresting agent and was then escorted to F.B.I. headquarters for routine processing. At the F.B.I. offices he was asked to produce his wallet and briefcase for examination, which he did. Among the items found as a result of this examination were credit cards bearing the names and signatures of "Robert Worthington", "Theodore R. Garris" and "R. T. Worthington". In addition there was

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* Semper testified that he made $20,000 in 1973 and $18,500 in 1974 (Tr. 416, 422).

** Semper in fact had a $900 balance on a $1,000 loan with Chemical Bank (Tr. 423).

a driver's license in the name of "Robert W. Garris" and signed and blank checks in the name of "R. Theodore Garris" (G. Ex. 19; Tr. 501-507).

The Defense Case

The defendant did not present any evidence.

ARGUMENT

POINT I

The evidence was sufficient to support the conviction of Worthington on all counts.

Worthington contends that the evidence against him on each count was insufficient to support his conviction. Specifically he contends that the evidence was insufficient to show that the applications had been submitted for the purpose of influencing the banks' action in granting loans or that he had acted knowingly; that in certain instances there was no showing that he submitted or aided anyone else to submit the applications to the banks; that with respect to Count Four there was no showing that the statements on the application were materially false; and, that the testimony of the handwriting expert was insufficient to identify him as the author of the loan applications involved in Counts 1, 2, 8, 9, 10 and 11. Appellant's contentions are without merit.

The Government presented twenty-three witnesses and twenty-one exhibits to document the defendant's guilt. Although the claim is often made that the evidence of a defendant's guilt is overwhelming, here the assertion is clearly justified. Worthington's contention that there was no showing of any purpose by him to influence the banks'

actions in approving loans is utterly frivolous. The false statements in this case were made on bank loan applications, not on cocktail napkins. If there had been no intention to influence the banks' actions in approving loans, surely the last thing in the world Worthington would have done is to have these applications submitted to the banks' loan officers. So too, Worthington's claim that the Government failed to show that he acted knowingly barely merits a reply. The Government's case documented a year-long pattern of deliberate behavior aimed at inducing the Banker's Trust Company and the First National City Bank to grant loans based on false and fraudulent applications. Worthington's devious tactics can hardly be described as the product of innocent mistake or accident. Surely, the jury properly inferred from his actions that Worthington acted knowingly and with an intent to influence the banks' actions.

Nor can it seriously be argued that it was not proven that Worthington was responsible for submitting the applications to the banks. Properly qualified employees of the banks involved produced the loan folders and loan applications from their records. Further, with respect to all counts but Counts 1 and 2,* bank officers from the branches where the loans were processed testified to their receipt of the applications, most often directly from the defendant.** With respect to Count 7 where Philip

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* The testimony of the handwriting expert established the defendant as the author of the applications involved in these two counts.

** Betty Paynes, a loan officer at the First National City Bank, did not identify the defendant in court as the person who submitted the application involved in Count 9. She could only recall that the applicant was a heavy set, black male who wore a safari helmet (Tr. 326-327). Signficantly, Philip Nolan testfied that Worthington always wore very unique style hats, among them "a safari jungle-type helmet" (Tr. 287).

Nolan, using the name Philip Friedman, physically took the application to the bank, Nolan testified that he filled out the application inserting false data supplied by Worthington and that he took the application to a branch of the Banker's Trust Company designated by Worthington (Tr. 268-270, 273-274).

Moreover, the applications clearly contained materially false statements. In all but one application, Worthington used false identifying data—date of birth and/or social security number.* In every application he used false information as to present and past residence, false information as to present and past employment history, and false information as to then existing indebtedness. Samach, Nolan, Edman and Semper testified as to the falsity of the loan applications bearing their names. Comparison of the three applications submitted by Worthington on his own behalf (under three different names) is sufficient to determine their falsity. In his brief Worthington specifically challenges the Government's failure to prove falsity only as to Count Four. Among the more flagrantly false items on this application are that Worthington had been employed by the American Planning Corp. at 520 Fifth Avenue and the World Trade Center for 17 years; that his current salary was $4,900 per month (a claim substantiated by a fraudulent W-2 form); that he drew $300 per week from the LaBoheme Restaurant; and that he was *not* indebted to the First National City Bank despite the approval of a loan to finance his Lincoln Mark IV only a few months before. It is thus unnecessary to rely on the discrepencies as to the date of birth, social security number and residence between this application and those submitted by Worthington under other names.

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* The exception was the Joseph Semper application, charged under Count Ten.

The only question remaining is the adequacy of the testimony of the Government's handwriting expert. The handwriting expert's credentials were impressive (Tr. 511-512, 546) and his standing as an expert was conceded (Tr. 512). He examined writings on the applications involved in Counts 1, 2, 4, 5, 8, 9, 10 and 11. He also considered: Government Exhibit 13, a receipt which Elliot Samach testified was written out and signed by Worthington in his presence (Tr. 190-191); Government Exhibit 14, a handwritten note which, according to Philip Nolan's testimony, was left with his secretary in an envelope bearing the printed return address "American Planning Company of New York, Inc., Two World Trade Center, Suite 2242, New York, N. Y. 10048" and which Worthington acknowledged to Nolan in a subsequent conversation (Tr. 277-280); Government Exhibit 18, an envelope and handwritten letter dated April 15, 1975 addressed to the prosecuting attorney in this case,* who testified that Worthington inquired of him a few days later at a pre-trial conference whether he had gotten "my letter" (Tr. 489); and five items from Government Exhibit 19—a Bank Americard bearing the signature of "Robert Worthington", a Master Charge card bearing the signature of "Theodore R. Garris", an American Express card bearing the signature of "R. T. Worthington", a driver's license, bearing the signature of "R. W. Garris", and a personal check signed by "R. Theodore Garris". These five items were found on the defendant's person when he was arrested on December 18, 1974 (Tr. 502). After examining each of these exhibits the expert stated his opinion that "all of these documents were prepared by one and the same person" (Tr. 518). Surely, the jury could draw only one reasonable inference: that the

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* The author of the letter mistakenly inverted the attorney's name ("Mr. Reilly Gorman"), an error repeated by the defendant when he first encountered the Assistant in court (Tr. 488-489).

common author was the defendant Robert Worthington. See *United States* v. *Wolfish*, slip op. 5633, 5640 (2d Cir. Aug. 14, 1975).

On the basis of the evidence presented by the Government, together with all inferences which might reasonably have been drawn from the facts, a jury could fairly conclude Worthington's guilt beyond a reasonable doubt. *United States* v. *Brawer*, 482 F.2d 117 (2d Cir. 1973), *on remand*, 367 F. Supp. 156 (S.D.N.Y. 1973), *affirmed*, 496 F.2d 703 (2d Cir.), *cert. denied*, 419 U.S. 1051 (1974); *United States* v. *Bohle*, 475 F.2d 872 (2d Cir. 1973); *United States* v. *Taylor*, 464 F.2d 240 (2d Cir. 1972); *United States* v. *Martinez*, 486 F.2d 15 (5th Cir. 1973); *United States* v. *McCall*, 460 F.2d 952 (D.C. Cir. 1972).

POINT II

The items contained in Government Exhibit 19 were properly received in evidence as the fruit of a search incident to a lawful arrest.

Worthington contends that Government Exhibit 19, which consisted of various items found in Worthington's wallet and briefcase at the time of his arrest on December 18, 1974 should have been excluded from evidence as the product of an unreasonable search and seizure. In support of this claim he argues (i) that there is serious doubt that the arrest was lawful, (ii) that the search was not incident to or contemporaneous with the arrest, (iii) that prior to the search he was not advised of his Fourth Amendment rights, and (iv) that the items seized were not evidence of a crime. These arguments are meritless.

Worthington, represented by skilled counsel, did not question the validity of his December 18, 1974 arrest at

his trial below.* Instead, defendant chose only to assert that the evidence was irrelevant (Tr. 502; A-110) and later to press the erroneous claim that the FBI agent was required to advise him of his constitutional rights immediately before asking him to produce the contents of his wallet and briefcase** and to exhibit a copy of an arrest warrant before arresting him (Tr. 506-507, 510-511; A-114-A-115, A-118-A-119). In his brief on appeal it is contended for the first time that "there is serious doubt that the arrest was lawful, there being no warrant and no proof of an authorization to arrest defendant." (Appellant's Brief at 21). This belated suggestion of doubt as to the validity of the arrest is no substitute for a proper objection, timely made in the District Court.*** *United States* v. *Bryant*, 489 F.2d 785 (2d Cir. 1973); *United States* v. *Eisenmann*, 396 F.2d 565, 568 (2d Cir. 1968); *United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965) (*en banc*), *cert denied*, 383 U.S. 907 (1966). But even if this Court were to take cognizance of this belatedly asserted claim, it would find the claim devoid of merit. For the fact that the FBI agent who asserted Worthington on December 18, 1974 had no warrant is of

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* As Worthington and his counsel well knew, a complaint was filed against the defendant that very day. An indictment was subsequently filed against Worthington on December 20, 1974, alleging a violation of the Federal wire fraud statute. 74 Cr. 1188. The case is now pending before the Honorable Whitman Knapp. (See tr. 510).

** The FBI agent fully advised the defendant of his *Miranda* rights at the time of his arrest, some twenty minutes before the allegedly illegal search (Tr. 504-505).

*** Indeed, the motion to suppress should have been made prior to trial. F.R. Cr. Proc. 41(f); *United States* v. *Amaral*, 488 F.2d 1148 (9th Cir. 1973); *United States* v. *Blackwood*, 456 F.2d 526 (2d Cir.), *cert. denied*, 409 U.S. 863 (1972). Worthington obviously knew that these credit cards and checks had been seized by the Government and would be useful to its case.

no significance. A warrantless arrest based on probable cause is clearly valid. *Ker* v. *California*, 374 U.S. 23, 34-35 (1963); *United States* v. *Fernandez*, 480 F.2d 726, 740 n.20 (2d Cir. 1973); *United States* v. *Drummond*, 354 F.2d 132, 153 (2d Cir. 1965) (*en banc*), *cert. denied*, 384 U.S. 1013 (1966).*

Furthermore, notwithstanding Worthington's lengthy quotation from a Justice Department handbook, the Supreme Court has now laid to rest the notion that the police are precluded from making anything but a cursory search of a person lawfully arrested and in custody. In *United States* v. *Robinson*, 414 U.S. 218 (1973), the Court upheld the introduction into evidence in a narcotics case of heroin which had been seized from a defendant during the course of an arrest for driving a motor vehicle after the revocation of an operator's permit. The heroin was found inside a crumpled cigarette package which had been taken from the pocket of a jacket the defendant was wearing. The Court stated:

> "The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect. A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search, incident to the arrest requires no additional justification." *Id.* at 235.

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* The warrantless arrest by the agent was, in addition, authorized by statute, 18 U.S.C. § 3052, and by the United States Attorney's Office (Tr. 506-507).

See also *Gustafson* v. *Florida*, 414 U.S. 260 (1973); *United States* v. *Lam Muk Chiu*, *slip op.* 3653, 5657-5658 (2d Cir., Aug. 15, 1975); *United States ex rel. Muhammad* v. *Mancusi*, 432 F.2d 1046 (2d Cir. 1970), *cert. denied*, 402 U.S. 911 (1971).

Nor is the fact that the search of Worthington took place at FBI headquarters some twenty minutes after his arrest of any moment. At the time of Worthington's arrest both his wallet and his briefcase were in his possession (Tr. 501-02). In that circumstance there can be no question about the lawfulness of the search and seizure, since it is now established that delayed searches of a lawfully arrested defendant's person and the possessions which were under his control at the time of the arrest are reasonable and proper. See *United States* v. *Edwards*, 415 U.S. 800 (1974); *United States ex rel. Muhammad* v. *Mancusi*, *supra*; *United States* v. *Caruso*, 358 F.2d 184 (2d Cir.), *cert. denied*, 385 U.S. 862 (1966); *United States* v. *DeLeo*, 422 F.2d 487, 491-93 (1st Cir.), *cert. denied*, 397 U.S. 1037 (1970). Such searches may include a defendant's wallet and briefcase. *United States ex rel. Muhammad* v. *Mancusi*, *supra*.

The appellant's remaining arguments barely merit a reply. Precisely because he was lawfully in custody Worthington had no legal right to be protected from a search of personal effects within his control. Thus, there was no requirement to advise him of a Fourth Amendment right he did not have. For the same reason it makes little difference whether the items seized during such a search were evidence * of the crime for which the defendant was arrested or of a separate and unrelated crime. They are still subject to seizure. *United States* v. *Robinson*, *supra*.

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* Appellant's claim that the items are not in fact evidence of a crime but only evidentiary materials used in a criminal case (Brief, p. 21) is a distinction with no discernible meaning.

Finally, even if the search and seizure were found to be unlawful, the defendant suffered no prejudice. The credit cards and checks seized on December 18, 1974 were but a small part of the writings considered by the handwriting expert in reaching his conclusion that documents clearly authored by Worthington and the loan applications had a single author. Thus, even without these items, it is inconceivable that the expert's conclusion that the remaining documents were all written by the same person would change. The expert was not, after all, asked to nor did he consider these items as being the known writings of the defendant. The jury had overwhelming evidence, besides Government Exhibit 19, to support its determination that the common author was Worthington.

POINT III

The use of photographic spreads was not impermissibly suggestive and did not deny defendant a fair trial.

Worthington alleges that the in-court identification of him made by certain bank loan officers was the result of the use of impermissibly suggestive photographic displays. He also contends that the repeated use of photographs, first by bank security personnel and then by FBI agents, served "to conjure up a vision of the defendant" in the minds of the witnesses (Appellant's Brief at 23). These claims are without substance.

Shortly before the day of trial defense counsel moved to suppress the anticipated in-court identification of defendant by various bank loan officers as being the product of impermissibly suggestive photographic displays. After the jury had been selected and opening statements had been made, the Court excused the jury and proceeded to

conduct a hearing on the defendant's motion. Unable to complete the hearing by the close of the first day, the Court scheduled the hearing testimony of the one remaining witness, Antonio Millares, to be taken outside of the presence of the jury on the day when Millares was to testify at trial. The appellant registered no objection to this procedure, and Millares testified on the third day of trial immediately following a hearing outside of the jury's presence. No formal findings of fact or explicit ruling on appellant's motion were made at any time during the trial. However, the District Judge permitted each bank loan officer who testified to make an in-court identification of Worthington at trial. No objection was raised by the defendant. At no time did defense counsel ask for a ruling on his motion either before the witnesses testified or thereafter. The Court's ruling in favor of the Government, implicit in its allowance of the in-court identification of Worthington by the bank witnesses, *cf. United States* v. *Domenech*, 476 F.2d 1229, 1232 (2d Cir.), *cert. denied*, 414 U.S. 840 (1973), was not error.

Due process is violated by an identification procedure, here the use of photographic displays, only when *first* the procedure is unduly suggestive and *secondly*, assuming an impermissibly suggestive display, its use, considering the "totality of the circumstances," is "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Neil* v. *Biggers*, 409 U.S. 188 (1972); *Simmons* v. *United States*, 390 U.S. 377 (1968); *United States* v. *Tramunti*, 513 F.2d 1087, 1116 (2d Cir. 1975); *United States ex rel. John* v. *Casscles*, 489 F.2d 20, 23 (2d Cir. 1973); *cert. denied*, 416 U.S. 959 (1974); *United States ex rel. Phipps* v. *Follette*, 428 F.2d 912, 914-15 (2d Cir.), *cert. denied*, 400 U.S. 908 (1970). Among the factors to be considered are:

> "the opportunity of the witness to view the criminal at the time of the crimes, the witness' degree of attention, the accuracy of the witness' prior de-

> scription of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." *Neil* v. *Biggers*, *supra*, at 199-200.

Applying these criteria to the challenged in-court identifications made by certain of the bank officers, it can be concluded that there was no substantial likelihood of irreparable misidentification.

Of necessity, Worthington has focused on the in-court identification made by only some of the bank employees.* Thus, only the identifications made with respect to Counts 4, 6, 10 and 11 have been challenged. Since Count 6 was dismissed by the Court, consideration can be limited to the identification made by Ilse Katz (Count 4), Antonio Millares (Count 10), and Joseph Angelon (Count 11).

Mrs. Katz was shown a spread of six photographs by a bank security officer, James A. Shand, on September 27, 1974. The photographs (H. Ex. 1) were all of black males. Shand testified that Mrs. Katz picked out a photograph of Worthington but stated that she was not sure of the identification (Tr. 27). But Mrs. Katz testified that she spoke with Worthington on two occasions at the bank during April of 1973. The first interview took about twenty minutes; the second visit lasted five minutes (Tr. 101-102, 104). She recalled being shown a spread of photographs by Shand, and picked out a photograph of Worthington at the hearing. She did not recall any of the other photographs in the Shand spread (H. Ex. 1).

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* Ms. Williams of Banker's Trust Company, it will be recalled, was the defendant's luncheon partner on two occasions and had seen him at the bank about ten times (Tr. 91-92, 340-341). And Mr. Batchellor of First National City Bank saw the defendant "many times", both inside and outside the bank (Tr. 323).

Nor was she ever shown any other photographs (Tr. 105-107). She readily identified the defendant at trial (Tr. 332). An examination of the photographic spread fails to show that it was in any way suggestive. Notwithstanding, Mrs. Katz' identification of Worthington at trial was obviously based on an independent recollection of the defendant.

Antonio Millares likewise had a vivid and independent recollection of the defendant. He spoke with Worthington at close range for five minutes when the defendant appeared at his branch with the Joseph Semper application (Tr. 369-370). He saw Worthington about a week later for a short time, about forty-five seconds (Tr. 370). Within a few days Millares was shown a spread of five photographs by security officer De Filippi. The pictures were of the same size and were all of males. Millares thought—but was not sure—that there was a mixture of blacks and whites (Tr. 370-372). Shortly thereafter Millares was shown a single photograph * by De Filippi which he identified as the same person whose photograph he had earlier selected from the spread. He also recalled being shown a single photograph by FBI agent Mike Shea (Tr. 371-372). But Shea testified that he presented Millares with a spread of six photographs (H. Ex. 2) from which Millares selected a photograph of Worthington (Tr. 53-54). He was not shown any other photographs between September 1974 and the date of trial and testified that he had an independent recollection of the person who presented the Semper application. He identified Worthington at trial without hesitation (Tr. 376-377).

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* Although the use of single photographs is not favored and would ordinarily be considered impermissibly suggestive, *United States ex rel. Gonzalez* v. *Zelker*, 477 F.2d 797, 801 (2d Cir.), *cert. denied*, 414 U.S. 924 (1973), here the only effect was to match up the single photo with the photo the witness had recently selected from a non-suggestive spread of photographs.

Finally, Joseph Angelon had little difficulty in recalling the person who presented him with the Phill Nolan loan application. Although Angelon spoke with Worthington for a relatively short period of about five minutes during mid-September 1974, he had a vivid memory of the defendant's appearance and attire (Tr. 110-111, 115). Angelon remembered being shown two spreads of photographs by security officer De Filippi. When shown the Shand spread (H. Ex. 1) at the hearing, he recognized a profile shot of Worthington. He was not shown any photographs by the FBI and was not shown any photographs between September 1974 and the date of trial (Tr. 112-114). He was able to identify Worthington, the man known to him as Nolan, without difficulty (Tr. 366).

It is apparent that none of these witnesses required prompting by the use of photographs to aid their identification of Worthington. Each had a clear and independent recollection of the defendant. *United States* v. *Wolfish*, slip. op. 5633, 5642 (2d Cir., Aug. 14, 1975). The in-court identifications were positive and unshaken by cross-examination. *United States* v. *Yanishevsky*, 500 F.2d 1327, 1330- 1331 (2d Cir. 1974); *Haberstroh* v. *Montanye*, 493 F.2d 483 (2d Cir. 1974); *United States ex rel. Gonzalez* v. *Zelker*, *supra*, at 803. Millares and Angelon were shown the photographs shortly after their meetings with Worthington when his image was still fresh in their minds. *Neil* v. *Biggers*, *supra; Simmons* v. *United States*, *supra*, at 385; *United States ex rel. Beyer* v. *Mancusi*, 436 F.2d 755 (2d Cir.), *cert. denied*, 403 U.S. 953 (1971). A considerable period elapsed between the showing of the photographs to the three witnesses and their testimony at trial. *United States ex rel. Valentine* v. *Zelker*, 322 F. Supp. 440, 443 (S.D.N.Y.) (Frankel, J.), *aff'd*, 446 F.2d 857 (2d Cir. 1971). Finally, there was abundant corroborative evidence in the record to support the conclusion that it was Worthington who pre-

sented the applications to the banks in question. *Haberstroh* v. *Montayne*, *supra*, at 485; *United States ex rel. Gonzalez* v. *Zelker*, *supra*, at 803-804.

POINT IV

Appellant was not deprived of a fair trial due to failure of the Government to formally advise in each instance that a witness might be subject to prosecution.

At the start of the Government's case, counsel for Worthington made the request that the Court advise any Government witness subject to indictment and not represented by an attorney of his constitutional right not to testify if to do so would tend to incriminate him.* Although the record is not entirely clear on the point, it appears that the Court acceded to Worthington's request, but asked it that it be notified when such a witness would testify so that it could give the requested advise outside the presence of the jury (Tr. 129). In response and to be sure to err on the side of caution, the Government stated that it would prefer that the requested advice of constitutional rights be given to any witness whose application was submitted in conjunction with Worthington's activities (Tr. 129-130). Worthington now contends for the first time on appeal that he was denied a fair trial because Government counsel did not give formal notice to the Court each time such a witness was about to testify. This claim is frivolous.

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* The Government objected to this unusual procedure. It was particularly concerned that if such advise was to be given it be done outside the presence of the jury (Tr. 128; A-60).

It should be obvious from a reading of the transcript that by agreeing to extend the class of witnesses to be covered by Worthington's request to *all* persons on whose behalf Worthington submitted false loan applications rather than only those subject to indictment and unrepresented by counsel, the Government was putting the Court and the defendant on notice as to the identity of the witnesses affected. Otherwise the Government would have had to make a determination each time whether the witness was subject to indictment and whether he was represented by a lawyer. Thus defense counsel who knew the identity of each witness for whom an application had been handled by Worthington was in a position to remind the Court to excuse the jury and give the requested advice of constitutional rights wherever such a witness took the stand. Not once during the trial did defense counsel ask that a witness be so warned. Not once either before or after such a witness testified did defense counsel object to the failure of the Government to give separate notice that the witness should be advised of the Fifth Amendment privilege. Having rested on his rights—such as they were—it ill-befits Worthington now to complain that the Government lulled him into a false sense of security that the Assistant United States Attorney, not defense counsel, would press the Court to excuse the jury and give the desired advice of constitutional rights to the witnesses involved. Surely, this was the responsibility of defense counsel, not the Government.

Furthermore, Worthington suffered no prejudice. First, the witnesses were not entitled to be warned of a Fifth Amendment privilege to remain silent since they were not in custody. *Miranda* v. *Arizona*, 384 U.S. 436 (1966); *United States ex rel. Sanney* v. *Montanye*, 500 F.2d 411, 416 (2d Cir.), *cert. denied*, 419 U.S. 1027 (1974); *United States* v. *Hall*, 421 F.2d 540 (2d Cir.

1969), *cert. denied*, 397 U.S. 990 (1970); *Iverson* v. *State of North Dakota*, 480 F.2d 414, 425 (8th Cir.), *cert. denied*, 414 U.S. 1044 (1973); *Robinson* v. *United States*, 401 F.2d 248, 251 (9th Cir. 1968). Furthermore, it is clear that the Fifth Amendment privilege of the witnesses was personal to them and could not be asserted by the defendant. *Couch* v. *United States*, 409 U.S. 322 (1973); *Rogers* v. *United States*, 340 U.S. 367, 371 (1951); *United States* v. *White*, 322 U.S. 694, 704 (1944); *Hale* v. *Henkel*, 201 U.S. 43, 69-70 (1906); *McAlister* v. *Henkel*, 201 U.S. 90 (1906). Thus, Worthington had no legal interest to be protected by the Court's undertaking to advise the witnesses of their Fifth Amendment rights.

Also, the failure to so advise the witnesses had no effect on the outcome of the trial as a practical matter. Of the four witnesses affected two had been told by the Government that they would not be prosecuted and the other two were innocent dupes who were clearly not subject to prosecution. At a side bar conference the Government informed the Court and defense counsel that Elliot Samach had been told that he would not be the subject of a federal prosecution (Tr. 157-158). Philip Nolan was told essentially the same thing (Tr. 287-288, 321).* Both Samach and Nolan were therefore effectively immunized from Federal prosecution for their crimes. *United States* v. *Carter*, 454 F.2d 426 (4th Cir. 1972); *United States* v. *Paira*, 294 F. Supp. 742 (D.D.C. 1969); see also *Santobello* v. *United States*, 404 U.S. 257 (1971). It is therefore speculative in the extreme to argue that Samach and Nolan would not have testified had they formally been told by the Court of their right not to do so. So too,

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* Samach and Nolan were, however, advised that no commitment could be made as to what state prosecutors might do.

Edman and Semper had little reason not to testify. The evidence clearly indicates that they were the innocent victims of Worthington's criminal behavior and had no cause to assert a Fifth Amendment privilege. In sum, Worthington suffered no denial of due process as claimed. At most he was denied the unusual courtesty of having the Court recite the Fifth Amendment to these witnesses in a context where it had no practical application.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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Assistant United States Attorneys Of Counsel.

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

T. GORMAN REILLY being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 11th day of September 1975 he served 2 copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

DAVIS J. STOLZAR, ESQ.
600 Madison Avenue
New York, N.Y. 10022

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

T. Gorman Reilly

T. GORMAN REILLY

Sworn to before me this

11th day of September 1975

Jeanette Ann Grayeb

JEANETTE ANN GRAYEB
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Commission Expires March 30, 1977